

**Response to Comments Received on the Preliminary Draft of the Proposed Renewal of the General
Water Pollution Control Permit for Concentrated Animal Feeding Operations**

Feedlot Permit Program

Division of Environmental Services

October 8, 2015

Many comments received by DENR are the same or similar. For this document, the DENR has combined similar comments and prepared the enclosed responses which will be mailed to all those who commented. Section numbering and permit page numbers provided are for the September 2, 2015, draft of the general permit and may be changed before the formal reissuance process begins.

Comment 1: There is no monitoring or testing of manure pits for leakage. How would one know if a covered pit is leaking (pig barn) without test wells or soil borings?

Response: The general permit contains clay and synthetic liner design and construction standards to ensure the earthen containment structures are properly constructed. The general permit also references concrete design and construction standards to ensure concrete structures are water tight. The producer's engineer submits a Notice of Completion documenting the manure management system has been constructed as it was approved. The producer is required by the permit's site inspection requirements (page 36) to conduct weekly inspections of manure, litter, and process wastewater containment structures and note the level of process wastewater in process wastewater containment structures in relation to the maximum operating level. This allows the producer to watch for unusual changes that would indicate a leak in the system. In addition, DENR staff visually inspect wastewater containment structures and review containment structure inspection records when conducting inspections. If rodents or rodent damage is observed, the producer is required to eliminate the rodents and to make any liner or berm repairs. If an operation is located over a shallow aquifer, it is required to obtain a ground water discharge permit and/or conduct ground water monitoring near the wastewater containment structures. Laboratory reports from samples taken from ground water monitoring wells for these operations are reviewed by the department when they are received to look for trends or see if significant changes are occurring.

Comment 2: The research on injecting manure into tiled ground suggests methods to insure that groundwater is not affected by the practice. Even though the EPA doesn't require any special methods, DENR can. Fall application on tiled ground should be avoided especially if there is no cover crop. The 'fertilizer' sits in the ground until used. Spring thaws and rains will force those nutrients into the tile lines unlike untilled ground. At least it should be noted somewhere whenever manure/wastewater is applied on a field where subsurface agricultural drainage tile has been installed. Open tile intake structures should be identified on the field maps (1.4.4.3.k.).

Response: The department has no way to determine which fields contain tile and which fields do not. Nutrient management planning can help ensure that the 4 R's (Right rate, Right source, Right application method, and Right application timing) provide the proper amount of nutrients to the crop where it is needed while protecting surface and ground water. Section 1.4.4.2.p. of the permit contains recommendations for the producer to reduce nutrient discharges from tile.

The U.S. EPA does not have the authority to require a NPDES permit for discharges of return flows from irrigated agriculture and the legislature has given the authority to regulate drainage to local government not to DENR. The Administrative Rules of South Dakota, Sections 74:52:01:06 (3) and (4) also do not allow a surface water discharge permit, which this general permit is, for tile discharges. Based on this comment, the division is adding references to the specific set back requirements to the field maps in Section 1.4.4.3.k. to this section.

Comment 3: Can't you do something about odor control or incorporate air quality requirements, such as for hydrogen sulfide and steroid emissions from manure decomposition?

Response: The department does not regulate odors for two reasons. First, although air quality and air pollution sources are regulated in South Dakota under the state and federal clean air acts, the department does not have the statutory authority to regulate odor. Second, because each individual has a different impression of what is an offensive odor, there is no good scientific basis at this time upon which to measure odors.

Federal law requires large CAFOs which emit 100 pounds or more of ammonia and hydrogen sulfide from their operations during any 24-hour period, to report this information to DENR. Information regarding emission reporting can be found on our website at [http://denr.sd.gov/des/gw/SARATitleIII/Emissions from Animal Waste.aspx](http://denr.sd.gov/des/gw/SARATitleIII/Emissions%20from%20Animal%20Waste.aspx). At this time, the federal EPA has not developed a model for the producer to use to determine if they meet this requirement. However, several universities have developed models that can be used by livestock operations to determine if they need to report. For more information contact Trish Kindt at (605) 773-3296.

The federal EPA is currently reviewing the results of their National Air Emissions Monitoring Study which may lead to additional air permitting or reporting requirements for CAFOs in the future. Several groups have also recently filed lawsuits against EPA requesting they adopt regulations that would regulate air emissions from certain CAFOs.

Comment 4: A general failure to mention the Treaty between the Sisseton-Wahpeton Oyate and the United States of America, February 19, 1867, 15 Stat. 505, (Ratified April 15, 1867, Proclaimed May 2, 1867), and otherwise mention (at least in more than one place), "Indian Country" as defined by federal law, may be implicated by subsurface water extraction and/or Racial Discrimination (ICERD) is required to enact domestic laws implementing obligations under Indian treaties entered into by the U.S.

Response: South Dakota's delegation of the National Pollutant Discharge Elimination System (NPDES) program was noticed in the January 11, 1994, *Federal Register* Water Pollution Control; Approval of Application by South Dakota to Administer the NPDES Program. The Notice addressed the issue of Indian Country as follows: As outlined in EPA's September 1, 1993 Federal Register and August 27, 1993 newspaper notices, EPA withheld from NPDES program authorization consideration those lands which were in Indian Country or for which there was significant controversy over whether or not the land was Indian Country. EPA provided copies of South Dakota's public notices to tribal councils and tribal environmental agencies. Tribal governments and affected permittees were also provided with copies of the list of permitted facilities which EPA would continue to administer. In withholding authorization for these areas, EPA was not making a determination as to whether or not South Dakota had adequate jurisdiction. This issue was considered deferred. Nevertheless, a number of comments were received regarding jurisdiction. No comments were received from tribal councils or tribal environmental organizations. As noted in the public notice, EPA made the decision to withhold authorization to administer the NPDES program on "Indian Country," as defined in 18 U.S.C. 1151.

If an operation requests a state permit, the State asserts jurisdiction over nonmembers and non-Indians on all lands lying within the external boundaries of an existing, diminished or disestablished reservation, unless the tribe has the complete right of exclusion with regard to the lands in question. This is consistent with the position the State of South Dakota has taken before the United States Supreme Court in South Dakota v. Bourland, 508 U.S. 679 (1993). The State's position is based upon Montana v. United States, 450 U.S. 544 (1981), and, with regard to the nonmember question, Duro v. Reina, 495 U.S. 676 (1990). The state may assert jurisdiction over nonmembers and non-Indians on trust lands lying within the external boundaries of the reservation dependent upon the outcome of the balancing test set out in White Mountain Apache Tribe v. Bracker, 448 U.S. Ct. 136 (1980). The State does not generally assert

jurisdiction over tribal members on Indian Country where the tribe has the complete right of exclusion with regard to the lands in question.

DENR's only references to Indian Country in the draft permit addresses the requirements for manure coming from CAFOs located in areas outside state jurisdiction (Section 1.2.1.3., pages 7-8) and for manure transferred from CAFOs where the state has jurisdiction to areas where the state does not have jurisdiction (Section 1.4.4.3.u., page 33).

The division does not recommend changes to the general permit based on this comment. This permit does not address the extraction of water from aquifers. That activity is regulated by the department's Water Rights Program. For more information on Water Rights, please contact Jeanne Goodman at (605) 773-3352.

Comment 5: A general over-reliance on voluntary self-compliance by producers with permit requirements.

Response: The NPDES program relies on permittees conducting self-monitoring and inspections required by their permit. DENR staff reviews the producer's test results, calculations required to be completed prior to land application, and inspection records to verify the operation is complying with its permit requirements. The department is committed to continuing to conduct inspections at permitted facilities and review annual reports to ensure the permit conditions are being met. The division does not recommend changes to the general permit based on this comment.

Comment 6: A general lack of an effective enforcement mechanism for producer violations of permit requirements and monitoring of remediation requirements.

Response: The department has an effective enforcement mechanism to address violations of the general permit, state laws, and administrative rules. The department's NPDES delegation documents include an Attorney General's Statement that indicates the state has the appropriate civil/administrative and criminal enforcement authority to administer the NPDES program and includes an enforcement agreement between the state and EPA. Additionally, EPA has periodically reviewed DENR inspection reports, accompanied DENR staff on inspections, and annually reviews all DENR enforcement actions.

Comment 7: A general lack of notice requirements by producers of complaints or litigation.

Response: South Dakota Codified Law, Section 34A-2-111 indicates no inspection or other action pursuant to § 34A-2-40, 34A-2-44, or 34A-2-45 that is based on, or is the result of, a complaint or the provision of information by a member of the general public may be carried out unless the person making the complaint or providing the information signs a complaint. The complaint shall remain confidential with the board and the secretary.

Once a complaint inspection and any department follow-up action such as enforcement is complete, the department's action is public information. The department does not generally public notice the results of complaint inspections or enforcement actions, and does not require the producer to do so. Members of the press and environmental groups have periodically asked for information on a specific CAFO enforcement action or a summary list of the department's CAFO enforcement actions.

Comment 8: A general lack of cross-referencing of other possible related permits which may be required from state, federal and tribal governments.

Response: A list of some commonly required permits and requirements is included in Section 1.4.8. of the permit. This list is not meant to be comprehensive as there are other permits and requirements that may apply to a CAFO. The department is not aware of any South Dakota tribes that have permits regulating CAFOs. The EPA has retained the authority to regulate CAFOs through the NPDES program in "Indian Country".

Section 1.2.1.2. on page 7 of the general permit indicates local governments are responsible for administering their ordinances and that this permit does not supersede or remove liability for compliance with local government ordinances. Section 1.4.4.3. on page 30 contains several references to ensure the operation's nutrient management plan includes any local requirements. Section 1.4.8 on page 38 of the permit indicates other permits and requirements that may apply to an operation. DENR will add local requirements to this section.

Comment 9: A general lack of adequate subsurface water extraction protections and monitoring.

Response: As indicated in the response to comment 4 above, Water Rights are regulated by the department's Water Rights program and not through this general permit. In South Dakota, all water (surface and ground water) is the property of the people of the state and whether a person needs a water right permit depends on the type of water use. The only type of water use which does not require a water right permit is domestic use. However, even domestic use of water requires a permit if water use exceeds either 25,920 gallons per day or a peak pump rate of 25 gallons per minute. If livestock operations exceed this use, a water right is required.

The department maintains both a ground water network that measures water levels and one that measures water quality. For more information on the network that measures water levels, contact the department's Water Rights Program. For more information on the department's ground water quality monitoring network, contact the South Dakota Geological Survey.

Section 1.4.3.4. on page 22 and in Appendix G of the draft permit does include ground water protection requirements and indicates when ground water monitoring is required. Section 1.4.4.4. on page 33 of the general permit also has ground water protection requirements for nutrient management planning.

Comment 10: A general lack of adequate surface water containment protections and monitoring.

Response: Section 1.4.3.3. on page 17 of the permit has specific design, construction, operation, and maintenance requirements to protect surface water. Additional requirements to protect surface water can be found in Section 1.4 starting on page 16. The department's Surface Water Quality Program has a Water Quality Monitoring network for surface waters. Information on the network can be found at <http://denr.sd.gov/des/sw/wqmonitoring.aspx>.

Comment 11: No mention as to whether manure is within the definition of and regulated as a "solid waste."

Response: Solid waste is defined in South Dakota Codified Law 34A-6-1.3 (17). Manure regulated by DENR's general water pollution control permit for concentrated animal feeding operations is not a solid waste as it is not discarded as a solid waste. The general permit requires the manure be used as a fertilizer. Operations with coverage under DENR's existing general permit and under the proposed NPDES general permit would not be included under the definition as operations with NPDES permits are excluded from the solid waste definition.

Comment 12: "Effluent Limits"

1.4.2. The precipitation exception (25-year, 24-hour) for contaminated water runoff from the producer should be deleted as lacking adequate containment protections, overreliance on voluntary reporting and lack of effective enforcement and monitoring mechanisms.

Response: The 25-year, 24-hour requirement for certain CAFOs is a requirement in federal regulations [40 CFR 412.13(b), 40 CFR 412.15(b), 40 CFR 412.25(b), 40 CFR 412.26(b), and 40 CFR 412.31(a)(1)(i)]. The state has adopted these regulations by reference in the Administrative Rules of South Dakota, Chapter 74:52:10.

Comment 13: "Ground Water Protection"

- a. 1.4.3.4. – The age exception to requirements for new containment structures to prevent migration of pollutants to ground water should be eliminated as lacking adequate containment protections, over-reliance on voluntary reporting, and lack of effective enforcement and monitoring mechanisms. There should be no grandfather clause.
- b. 1.4.3.6. – The determination by the Secretary whether a producer is located over a shallow aquifer should be modified to read "shall" and the word "will" deleted, and the phrase "shallow aquifer" should be defined and rephrased as "subsurface water" so as to include all subsurface waters, such as glacial water deposits that are not defined as aquifers and may be close to the surface. Reference to a U.S. Geological Survey data reference for the subsurface water and depth determination and baseline water quality data, should be required, such as "Water Resources of the Lake Traverse Reservation, South and North Dakota, and Roberts County, South Dakota; Water Resources Investigation Report 0 1-4219, published by the U.S. Geological Survey. If shallow subsurface waters are found by the Secretary, the imposed groundwater monitoring requirement by the producer should be changed from "may" to "shall" without exceptions.
- c. 1.4.3.6.a. E.coli should be added to the required ground water sampling parameters.

Response:

- a. The U.S. EPA does not have requirements for hydraulic conductivity or seepage for wastewater containment structures. Prior to the release of the 2003 General Water Pollution Control Permit for Concentrated Animal Feeding Operations, all manure containment structures that were approved or permitted by the department were required to meet a hydraulic conductivity of at least 1×10^{-7} centimeters per second **or** a maximum seepage rate of 1/16 inch per day at the maximum operating depth. Because operations constructed prior to the public notice date of U.S. EPA's 2003 CAFO rules were constructed to this standard, the department is not able to require operations with manure containment structures approved to that standard to reconstruct their system unless there is visible evidence of leakage from the containment structure or samples collected from upgradient and downgradient ground water monitoring wells that show the leakage from the containment structure is causing ground water pollution. The department inspects all manure containment structures during operation and maintenance inspections. Operations that have had damage to the constructed liners have been required to make repairs and submit permeability testing results indicating the repaired sections of the liner meet the current permeability requirements.
- b. Based on this comment, this section of the permit was reorganized and in some areas reworded to improve clarity. The definition of a shallow aquifer is from South Dakota Codified Law, Section 34A-3A-24. The determination on whether an operation is over a shallow aquifer is made based on SDCL 34A-3A-24, Section 1.4.3. of the general permit, Appendix G of the permit, site specific boring logs, county studies, and other available information. U.S. Geologic Survey publications fall into the other available information. The Feedlot Permit Program may request the State Geologist to conduct an independent evaluation of whether a process wastewater containment structure is located over a shallow aquifer.
- c. The department has not included coliform in the sampling requirements because other required parameters are used as an indicator of whether leakage of a manure containment system is occurring. We also have concerns about the ability of producers to collect coliform samples without having cross contamination from other potential sources of coliform. Where the results of ground water monitoring have indicated an increasing nutrient trend, the department has required collection of fecal coliform samples at CAFOs to better evaluate ground water quality conditions.

If a citizen has questions about potential coliforms at CAFOs, they should contact the department's Ground Water Quality Program at (605) 773-3296.

Comment 14: "Manure and Wastewater Land Application Sites"

1.4.4 (3) u – The reference to "Indian Country" should be added throughout the draft permit whenever jurisdictions are listed, not just to manure and wastewater land application sites.

Response: As indicated in the response to comment 4 above, DENR does not have jurisdiction in "Indian Country". EPA has jurisdiction over CAFOs in "Indian Country." This section is asking for information when manure is transferred outside DENR's jurisdiction. DENR has received land application agreements for at least one operation signed by representatives of the Bureau of Indian Affairs (BIA). If the tribe has additional land application requirements, we recommend they work with the BIA.

Comment 15: "Record Keeping Requirements for Production Area" and "Annual Reporting Requirements"

I .4.6-1.4.7 – The record keeping requirements and annual reporting should be required to be sworn to by the producer as true under penalty of perjury.

Response: The annual report form provided to producers by the Secretary each year indicates: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the manure management system(s) or those directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for knowing violations. In addition, I certify that I am aware of the terms and conditions of the General Permit for Concentrated Animal Feeding Operations and I agree to comply with those requirements." The division does not recommend changes to the general permit based on this comment.

Comment 16: "Inspection and Entry"

1.8.2. – The phrase, "The Secretary shall only have access to the animal confinement areas if it becomes absolutely necessary to determine compliance with this general permit" should be deleted, as an unreasonably high bar restricting supervision, compliance, monitoring, and enforcement. Unannounced inspections should be added at the discretion of the Secretary in the interest of public health and safety. There should be periodic unannounced inspections.

Response: This requirement comes from the Administrative Rules of South Dakota, Section 74:57:01:02. This rule addressed producers' biosecurity concerns. The department does not normally enter barns or lot areas where animals are present due to employee safety and biosecurity risks. It does not limit department inspectors from observing manure containment systems and reviewing producer's records required by the general permit to determine if an operation is in compliance with its permit. While the department can conduct unannounced inspections, we have found it a better use of our resources to contact the producer a short time in advance and schedule an inspection. This short timeframe does not give the producer enough time to make significant changes that would have an impact on an operation's compliance status. It also makes it less likely that a DENR inspector will travel several hours to an operation and find no one home, or the person who maintains the required records not at the operation. The division does not recommend changes to the general permit based on this comment.

Comment 17: 1.4.3.3.p. – If a state inspector has determined that dike erosion is significant, repair and installation of erosion protection ought to be required, not optional. The word “may” should be replaced with the word “shall.”

Response: The division has made this change requiring the erosion be repaired, but is leaving the discretion to require the installation of erosion protection to the Secretary.

Comment 18: 1.4.5.5. I request that the permittee be required to include a record of both when a deficiency is found and when it is corrected.

Response: The division has made this change.

Comment 19: There should be a fourth class of CAFOs into which extra-large operations should fall.

Response: The Administrative Rules of South Dakota, Section 74:57:01:04, sets the minimum inspection frequency for operations with twice the minimum number of animals to be a large CAFO. If the Secretary felt it was beneficial, Feedlot Permit Program staff could inspect these operations more frequently. However, just because there are more than a certain number of animals at an operation does not automatically make more frequent inspections more protective of the environment.

The commenter specifically brought up two separate proposed 6,000,000 layer chicken operations that have looked at locating in the state. At least one of these operations told county planning and zoning that they were planning to sell their manure as a commercial fertilizer. This is allowed by U.S. EPA regulations that the state has adopted and is common in other states for poultry operations, but the proposed general permit would require that operations who give away or sell more than 100 cubic yards of solid manure or any process wastewater and do not land apply it in accordance with the operation’s permitted nutrient management plan may be subject to the South Dakota Department of Agriculture commercial fertilizer law (SDCL 38-19) and are required to obtain an individual water pollution control permit.

Comment 20: Section 1.1.1 refers to a 25-year, 24-hour storm event. This section refers to NOAA Atlas 14 Volume 8 as the basis for the amount of precipitation to be used for the 25-year, 24-hour storm event. It appears NRCS will now be using the Atlas 14 Volume 8 for all NRCS applications and practices. South Dakota Farm Bureau (SDFB) believes it is imperative that both agencies continue to use the same source for determining the storm event amounts. This will minimize confusion during the development and construction of a manure management system.

Response: Feedlot Permit Program staff communicates regularly with NRCS. We try to keep our requirements as consistent as possible. Several changes are being proposed to this draft permit to reflect changes to NRCS standards that have occurred since the last permit was issued.

Comment 21: Section 1.2.1.3. requires having state permit coverage if an operation from another state or Indian Country applies manure or processed wastewater in South Dakota. SDFB supports this addition and appreciates allowing the Secretary the option of waving the requirement if the application is under an existing NPDES permit.

Response: No response is required to this comment.

Comment 22: Section 1.2.2.1.d. requires using the results of the NRCS SPAW hydrology tool and model inputs indicating the manure management system is designed not to discharge for permit eligibility. The SPAW model is also integrated into the Index (Table 2, page 32). The current SPAW model has a wind erosion component that is added to the water erosion in tons per acre. SDFB is very concerned that this wind component could be used in some way to link to air quality in an open lot. The permit goal is to prevent water pollution, not to control air quality.

Response: The SPAW model only applies to operations with uncovered lots or uncovered manure containment systems and is only run on these areas of the operation. The U.S. EPA's 2012 regulations require that new source swine, poultry, or veal operations applying for a NPDES permit run the SPAW model to verify they are designed for no discharge. The Feedlot Permit Program has added this to the requirements for a state permit for operations with open lots or open manure containment structures because operations requesting a state permit are not allowed to discharge.

SPAW is not a part of Table 2 in the permit. Table 2 is a phosphorous index table that is part of the nutrient management plan. Table 2 is in the current general permit. Minor changes were made to Table 2 based on recent changes to NRCS' 590 standard.

Comment 23: It is my understanding that we will have to run the SPAW model and to do this we will need an engineer and will incur expenses for having to do so. We will also have more expenses in order to run all new soil samples for every field in the NMP as well. This is all under the State permit model as we will not be pursuing the NPDES permit. We would prefer to not have to have any engineers responsible for putting together the new NMP so as to not have more expense in this process.

Response: If a producer decides to take the state permit option, they will need to run the SPAW model if they have open lots or an open manure containment system. If a producer decides to take the NPDES permit option, they will not need to run the SPAW model. The permit does require revisions be made to a permitted operation's nutrient management plan. The SPAW model or nutrient management plan update could be prepared by an engineer, crop consultant, Natural Resources Conservation Service staff, or if the producer has the expertise, they may do it themselves. Whoever prepares the SPAW model will need to use the design engineer's design information as model inputs. Any soil samples collected in the two years prior to submittal of the revised nutrient management plan can be used in the updated initial nutrient management plan. If no samples have been taken on a field in the past two years, then additional samples would need to be taken.

Comment 24: Section 1.2.3.7. for the modification of the manure management system or nutrient management plan, public notice will be on DENR's one-stop public notice website. SDFB appreciates this requirement of notice being required on the website and not required in the print media.

Response: No response to this comment is required.

Comment 25: Section 1.4.3.3.t. indicates if a production area or land application areas are within ¼ mile of streams where USFWS has observed Topeka Shiners or Topeka Shiners have potentially occupied, the CAFO shall develop and implement an Endangered Species Action Plan. In the summary of changes slides, it indicates the plan is needed if the Topeka Shiners are present. SDFB supports developing and implementing a plan if Topeka Shiners are "present." The wording "potentially occupied" can lead to uncertainty and overregulation.

Response: The NPDES permit regulations do not allow a permit to impact endangered species. The department has received comments from the U.S. Fish and Wildlife Service during several public notice periods for proposed operations.

The department is referencing the June 24, 2014, U.S. Fish and Wildlife Service map (http://www.sddot.com/business/environmental/endangered/docs/Topeka_dist.pdf). The map indicates

where Topeka Shiners have been observed or have potentially occupied. If the producer is able to obtain information from the U.S. Fish and Wildlife Service indicating the plan is not required at this location, DENR will not require it for that location.

Comment 26: Section 1.4.3.5.d Stockpiling: SDFB and others indicated they appreciated the flexibility in the rule for temporary stockpiling manure for longer than 14 days and less than 120 days. The use of a compacted soil berm to contain runoff from the stockpile site, or using an impermeable cover gives options to the producer at each site. Having the ability to temporarily stockpile manure up to 120 days can create efficiencies in the manure management system and maintain protection for water quality.

Response: No response to this comment is required.

Comment 27: Section 1.4.4.2.t. addresses manure application on saturated, snow-covered, or frozen soil. SDFB suggests a review of this wording and the 590 standard in light of the SDSU demonstration work relating to the spreading of manure on snow-covered ground. The final results of the demonstration will be available later this year.

Response: The proposed permit includes requirements in the South Dakota Natural Resource Conservation Service's 590 Standard. If the SDSU study results become available later this year and the 590 standard is changed, DENR could reopen the permit to change these requirements. If DENR does this there will be a new public notice period on any changes. If changes are made, producers that submit a permit application in the first year may already have a permit application developed using the current standard submitted to DENR.

Comment 28: Section 1.4.4.3.v. allows a producer to sell or give away 100 cubic yards of solid manure per year without including it in their annual nutrient management plan, with certain conditions. SDFB suggests that any manure given away or sold that is picked up at the production site above the 100 cubic yards, and spread at the purchaser's discretion, is the liability of the receiver of the manure. The production facility's liability ends when the manure leaves the facility. This should require the recipient of the manure to obtain a manure management plan and accept liability for proper application. This concept should also apply to 1.4.4.3.u.

Response: A sentence has been added to this section indicating once the producer has completed the requirements of this section, the person who receives the manure is responsible for storing the manure and land applying the manure so it does not cause pollution of waters of the state.

Comment 29: Page 33: 1.4.4, #3, v – Solid Manure Sales/Give Away

While we understand the inclusion of this provision to reflect current practice in many areas, we would appreciate some additional clarification as we are concerned this may complicate sales of manure to third parties. We are particularly concerned the third sentence implies the CAFO operator may have some obligation/liability relative to how the manure is utilized once it leaves their operation. We stringently oppose any liability to the permittee once the manure leaves their place and assert that the individual/entity receiving or purchasing the manure must assume liability for proper application in accordance with the applicable regulations.

We also have concerns about the allowance for only 100 cubic yards as we believe the practice of selling manure is likely to increase throughout the life of the permit. We look forward to additional discussion in this area.

Response: See the response to comment 28. The general permit sets the requirements for the producer to follow to give away or sell 100 cubic yards of solid manure. If the department receives a water pollution complaint, we will investigate it the same as any other water pollution complaint. If we determine manure came from a permitted operation, we may request a copy of its required records for transferring manure.

Comment 30: This proposed general permit addresses only one option for open lot manure management systems, a holding basin. SDFB is concerned that a holding basin is not always the best method of developing a manure management system. The current permitting process encourages holding basins and discourages other technologies for manure management systems by requiring an individual permit. Together, we must protect the resources and help the livestock industry adopt new technologies and move forward with expanded numbers. Alternate and updated manure management system technologies are very effective in improving water quality or reducing water pollution. Allowing for their implementation in modern CAFOs would strengthen future general permit.

Response: The department has adopted U.S. EPA's requirements for alternative manure management systems, has issued an individual permit for one operation, and denied an individual permit for one operation. The vegetative treatment system involves a site specific design and can include site specific requirements such as water quality based discharge limits. The department is aware of other states issuing VTAs individual permits, but is not aware of any state covering VTAs under a general permit. Because of the site specific design and permit conditions of alternative manure management system, the department believes individual permits are the most appropriate permits for these systems.

Comment 31: Section 1.1.29 – Would a tile system or other artificial underground conduits be considered waters of the state. Specifically if the tile would tie together say multiple above ground ditches or bodies of water.

Response: Tile near a production or lot area could be considered a manmade conveyance if it discharges to surface waters of the state. The example sited would be no different than surface tile inlets in application fields. The U.S. EPA has requirements for setbacks for open tile intakes and other conduits to surface water which are incorporated in the proposed permit. Tiles are not waters of the state and are exempt from permit requirements for their discharges under the federal Clean Water Act, and we have no authority to permit under state law and rule. That is why the nutrient management planning section of the permit only has recommendations for application near tile. However, the type of system described could need county drainage approval. Additional information on tile can be found in the response to comment #2.

Comment 32: Section 1.2.2.2. – Operations modifying an approved or permitted system. If an operation modifies their nutrient management plan or makes changes to their manure management system would they need to apply for the new permit at that time?

Response: If an operation with coverage under the existing general permit plans to make a major modification (see definition) to its operation, it needs to submit an application for coverage under the new general permit prior to making the modification.

Comment 33: Section 1.4.3.3.e. – Why are specific pipe types called out in this section but not others? Do the pipe testing requirements for pipe over 100 feet in length include piping under a barn for pull plugs or on some of the deeper ponds, interpond piping that exceeds 100 feet?

Response: The division has rewritten this section of the permit to make it clear the specifications apply to PVC piping, but other types of non-corrosive piping can be used. The PVC specification was included because we are aware of some municipal projects where pipe not meeting these specs were inadvertently used. Changes were made to the language in the proposed permit to exclude pull plug piping beneath a barn.

Comment 34: Section 1.4.3.3.e. – The only evaporation listed in the tech paper 37 is pan evaporation. Should this be lake evaporation?

Response: The map used is for lake evaporation. If you would like a copy of the map, contact Jason Roggow with the Feedlot Permit Program at (605) 773-3351.

Comment 35: Section 1.4.3.3.l. – Can you explain the confidence interval simulation for the SPAW model?

Response: The Natural Resources Conservation Service is working with the State Climatologist to prepare the required model inputs from weather stations in the state that can provide the weather data needed to run the model. The department has not had an operation that has needed to use this process.

Comment 36: Section 1.4.3.3.aa. – Could you explain why you have added this section?

Response: The current general permit requires feed be covered so it cannot generate process wastewater or any runoff be contained. The U.S. EPA developed guidance after that permit was issued that requires runoff be contained for all feed and bedding. The department does not believe this is necessary for hay and straw so has proposed this modification to the general permit to exclude those items.

Comment 37: Section 1.4.3.4.a.1) – What depth would be used for this calculation? Max berm, max operating level?

Response: This will be calculated at the maximum operating level as any liquid above this level should only be there on a temporary basis and there is no liner above that level.

Comment 38: Section 1.4.3.4.e. – The way this is currently worded it requires trees to be planted. Is this what you intended?

Response: This language has been changed to make it clear that this language only applies if trees or shrubs will be planted.

Comment 39: Section 1.4.4.2.m. – Does this section apply to honey wagons?

Response: This only applies to operations that use temporary piping for land application. Temporary piping is not normally used with honey wagons.

Comment 40: The design sections reference several standards and include a date. Can we add language for new additions of the same code/specification that would supersede the existing one?

Response: South Dakota's Constitution requires references be date certain. This is so requirements don't automatically change after a permit is issued without citizen being able to take part in the process like they can when a permit is issued.

Comment 41: Pages 5: 1.1.12 – "Major Modification" We are concerned this definition is a misnomer as it appears that any change is covered, regardless of how minor that change might be. We assert there should be some allowance for minor changes in animal numbers, crop rotations, additional acres in the nutrient management plan, or other minor changes that will not significantly impact the environmental impact of the operation. Notifications to DENR when an extra animal or acre is added to the operation is not only time consuming and burdensome for the producer, but a drain on DENR resources as well.

Response: Several items listed in the definition of major modifications are required as part of the current general permit. The U.S. EPA's 2012 regulations contain additional requirements when significant changes are proposed to be made to nutrient management plans. The department has worked with NRCS

so the nutrient management planning tools allow some flexibility for things like revised crop rotations, where alternate crops are listed in the tool.

Comment 42: Page 22: 1.4.3, #3, aa – Feed & Other Raw Materials Storage. We are concerned about the necessity to contain runoff from feed stock piles and the design changes, and potentially significant associated costs, of updating existing facilities to meet this requirement. Additionally, we wonder how the current language might impact feedstuffs that are stored off site, i.e. silage or corn stored in nearby fields, but not actually at the feedlot. It seems they would be ok as long as they are covered, but once the feedstuff pile is opened and has an exposed face, we wonder how that would be addressed under the current language. Please clarify how existing facilities might be impacted when they renew their permit and also how off-site feed storage may be impacted. In addition, we suggest the final two sentences in this paragraph specify what kind of testing is required or not necessary – we assume it’s moisture testing. If so, we suggest the language be edited as follows:

“Examples of dry materials that are excluded from moisture testing are...”

“Examples of materials that need moisture testing are...”

Response: See response to comment 35. DENR has evaluated any feed storage shown on site plans. If feed is stored within one mile of the operation as described in the animal feeding operation definition and is under common ownership, it should be included on the site plan and permitted under the general permit. Any water pollution complaint of feed storage runoff will be investigated by the Feedlot Permit Program. We have made the suggested changes to the last two sentences of this section.

Comment 43: Page 29: 1.4.4, #2, t – Manure Application on Saturated, Snow Covered, or Frozen Soil

While we recognize this reflects changes recently made to the NRCS 590 Standard, SDCA remains concerned about the limited nutrient application allowed during the winter months. We are in agreement that no wastewater or manure should be applied via irrigation on saturated or frozen ground (#3) and we support the increased setbacks.

However, we are concerned about limiting the application to “incidental” amounts that may be collected during snow removal. As you are aware, SDSU has partnered with SDCA and other livestock producers to conduct a study on the potential runoff from nutrient applied on frozen soil. The study results indicate that runoff is minimal when manure is applied to frozen ground in upland areas with little or gentle slopes. We hope the study results have been shared with DENR and look forward to further discussion on the impact of further limiting winter manure application beyond what’s included in the current permit.

Additionally, SDCA has concerns about item #4 requiring producers to notify DENR prior to winter manure application. Since winter nutrient application is required to be included in the Nutrient Management Plan, we would argue that is all the notification that should be required. We assert DENR should assume nutrients will be land-applied according to what is outlined in the Nutrient Management Plan.

Response: See the response to comment 27. The program has changed the requirements so only items 6 through 10 apply to the application of incidental application of manure during cleaning of snow from lots and bunk lines. The item to notify the department is a recommendation “should.” We recommend this, as we often get phone calls from neighbors when winter application occurs, especially when white snow covered ground is turned brown by application.

Comment 44: Page 8: 1.2.2, #1, d – SPAW and Page 31: 1.4.4, #3, p – Wind Erosion

We have reviewed the NRCS' SPAW tool and we are comfortable with the modeling it provides. While we appreciate reference to the NRCS modeling tool on P. 31 regarding wind erosion, we wonder if wind erosion should also be addressed on P. 8, item d discussing discharge. In reading the definition of discharge, it doesn't outright indicate that wind erosion is NOT considered a discharge, so some additional clarification may be necessary.

Response: See response to comment 22. The NRCS has county maps that show where wind erosion shall be included in the erosion determination and where it does not need to be. Wind erosion of soil from a field is not a discharge under this water pollution control permit.

Comment 45: Page 32: 1.4.4, #3, q – Nitrogen Need/Phosphorous Removal

We assert this paragraph can use some additional fine-tuning. The Nutrient Management Plan will include fields that are eligible for nitrogen AND fields that require a phosphorous based plan and we submit that all fields that are included in the Nutrient Management Plan should qualify for determining if the producer has adequate acres since the NMP is a multi-year plan and soil testing will help determine nutrient application.

We suggest the following edits to the last two sentences of the paragraph, which would somewhat mirror language on p. 34 #2 (first sentence) regarding N:

Fields requiring a phosphorous based plan can be listed in the plan and used for manure application, when P levels allow based on a soil test. ~~However, these acres cannot be used to show a producer has enough land to apply manure generated at the operation to meet the permit requirements.~~

Response: Fields where application rates are based on phosphorous crop removal are not included in the available acres in the initial nutrient management plan as these fields may not be allowed to have manure or process wastewater applied to them if restricted by the soil test phosphorous level (see Table 2).

Comment 46: In Section 1.1.2 the definition of AFO includes two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other (within one mile). Why does this not pertain to the definition of CAFO?

Response: This definition does apply as a concentrated animal feeding operation must first be an animal feeding operation (see Concentrated Animal Feeding Operation definition).

Comment 47: It is not clear what type of operation or facility would qualify for a NPDES.

Response: Any CAFO could apply for a NPDES permit. Operations with covered lot areas and manure containment areas or operations with open lots or open manure containment structures that run the SPAW model to show they are designed to not discharge can obtain the state permit in lieu of the NPDES permit. The Feedlot Permit Program has updated the permit process section of the permit as indicated during the recent webinar.

Comment 48: In Section 1.2.3 paragraph 7, *written comments will not be accepted for operations designed to not discharge.* We feel that this removes any opportunity for the public to express concerns and present information about an existing operation expanding. It would allow an operation to increase from 5,000 to 20,000 head without public input.

Response: As indicated during the recent webinar, Section 1.2.3. of the permit has been rewritten to clarify the permit processes for the state permit and NPDES permit. DENR will public notice state permits for new operations or those increasing their maximum animal numbers and respond to any comments received. DENR will public notice all NPDES permits, respond to any comments received, and NPDES permits also allow the opportunity for a contested case hearing.

Comment 49: Section 1.4.2 allows a huge loophole for poor managers to exploit if pond overflow should occur.

Response: We disagree as Subsection 1 requires that the manure containment system be designed, constructed, operated and maintained to contain all manure, litter, and process wastewater, including the runoff and direct precipitation from a 25-year, 24-hour precipitation event and be in compliance with the terms and conditions set forth in this permit. If a producer is not properly managing their system and keeping required records documenting they are operating in compliance with this permit and has a discharge, it would be a permit violation.

Comment 50: Permit fees should be increased to allow for the employment of more inspectors. \$250 for an \$11 million facility seems pretty low.

Response: The permit fee is set by the legislature through South Dakota Codified Law, Section 34A-2-125. DENR believes it has adequate funding and staffing. Any changes to the permit fees or the authority to hire more staff would have to come from the legislature.

Comment 51: Penalties in Section 2.2 state up to \$10,000 a day. According to the summary of enforcement actions, this has never happened. Please include how penalties and fines are really calculated and increase them to a point where they act as a real deterrent.

Response: \$10,000 per day per violation is the maximum penalty that the department can assess for violations of this permit. The department has a penalty policy that is used to calculate each penalty the department assesses for all programs within the department. The penalty is based on the maximum penalty, number of violations, severity of the violations, environmental damage, willfulness, violation history, cooperation, mitigating factors, and economic benefit. This document was included in our NPDES delegation documents. These penalties are reviewed by the U.S. EPA annually. We believe our enforcement actions act as a deterrent.

Comment 52: We recommend requiring an annual on-site inspection of all CAFOS regardless of size. All medium CAFOs should have two random on-site inspections per year. All large CAFOS should have random on-site inspections on a quarterly basis.

Response: The Administrative Rules of South Dakota, Sections 74:57:01:04 and 74:57:01:04 sets the minimum inspection frequency for permitted CAFOs. Operations with twice the number of animals to be a large CAFO shall be inspected at least annually and all others once every three years.

Medium CAFOs are identified based on a complaint inspection. They may be able to take steps to remove the unacceptable condition that makes them a CAFO. If they are unable to do this, they need to obtain permit coverage and are inspected as all permitted operations are. While the department can conduct unannounced inspections, we have found it a better use of our resources to contact the producer a short time in advance and schedule an inspection. This short timeframe does not give the producer enough time to make significant changes that would have an impact on an operation's compliance status. It also makes it less likely that a DENR inspector will travel several hours to an operation and find no one home, or the person who maintains the required records not at the operation. See additional information in response to comment 16. The division does not recommend changes to the general permit based on this comment.

Comment 53: For feeding operations exceeding the 5,000 equivalent animal level, tighter regulations should be written which expand the protections needed for proper waste handling and the danger posed to water resources.

Response: The general permit sets the minimum environmental protection requirements for all concentrated animal feeding operations regardless of size. We do not believe additional requirements are needed for larger operations.

Comment 54: This proposed General Permit will be used for both discharging and no-discharge facilities. If the CAFO asks to be regulated as “no discharge” then they will be given a state permit number. If the CAFO asks to be regulated as a “discharge” facility, they will be given a NPDES permit number.

Response: As indicated during DENR’s webinar, under the permit number on the first page of the operations permit it will indicate whether they have a NPDES permit or state permit. Operations with a NPDES permit will be given a NPDES permit number. Operations with a state permit will be given a state permit number. These will be different enough that DENR will be able to identify which permit an operation has by permit number.

Comment 55: The elements of the General Permit that would minimize nuisance and offer protection of surface and ground water are items with the term “should” rather than “shall” thus denying the public necessary assurance that these important activities will occur.

Response: The South Dakota Legislature has given the authority to make land use decisions that regulate economic growth and development to local governments. The general permit **recommends** producers consider several conditions when siting, building, and operating a CAFO and **recommends** several Best Management Practices (BMPs) to reduce odor, flies, dust, noise, and other nuisances. These include considering the distance to neighboring homes, public buildings, residential areas, recreational areas, and the prevailing wind direction. Planting shelterbelts and adding other aesthetically pleasing controls are also recommended but not required. These BMPs are recommended, not required, because many of these issues are normally addressed at the county level through county zoning or nuisance ordinances. Please see the definitions of “shall” and “should” in the definitions section of the general permit as these words are used to differentiate between required and recommended conditions.

Comment 56: Which paragraphs apply only to NPDES permittees? For example, Section 1.4.2 prohibits any discharge except during a particular storm event – does that apply to both non-discharge and discharge facilities alike?

Response: Section 1.4.1. has been changed to clarify this is the effluent limit that applies to state permits. With this change, Section 1.4.2. will not apply to state permits.

Comment 57: Why would the state deny property rights to adjacent landowners and the public that may be adversely impacted by the proposed CAFO? What is the legal remedy to appeal an agency decision to approve a facility to operate under this General Permit?

Response: Section 3.9 of the general permit indicates: 1. The Secretary’s issuance of this permit, adoption of design criteria, and approval of plans and specifications, does not convey any property rights of any sort, any exclusive privileges, any authorization to damage, injure or use any private property, any authority to invade personal rights, any authority to violate federal, state, or local laws or regulations, or any taking, condemnation or use of eminent domain against any property owned by third parties. 2. The State does not warrant that the permittee’s compliance with this permit, design criteria, approved plans and specifications, and operation under this permit, will not cause damage, injury or use of private property, an invasion of personal rights, or violation of federal, state or local laws or regulations. The permittee is solely and severably liable for all damage, injury or use of private property, invasion of personal rights, infringement of federal, state or local laws and regulations, or taking or condemnation of property owned by third parties, that may result from actions taken under the permit.

The current general permit went through a public notice and contested case hearing process when it was issued. A contested case hearing was held before the permit was issued.

The permit requires the department to public notice state permit applications for new operations or those increasing their animal numbers once in a local newspaper. The public can submit comments during a 30-day period from when it was noticed. DENR will respond to all comments received.

If DENR agrees with comments received indicating a permit application does not meet the permit requirements, the department will require the producer make changes to their permit application so the application meets all permit requirements. If an application meets all permit requirements, the permit application is approved by the Secretary and construction can begin. Once a Notice of Completion is submitted by the producer's engineer, if all permit requirements are still met, the department issues permit coverage. This process is similar to that used for all other department general permits and is the process that will be used by operations applying for a state permit under the proposed general permit.

Under EPA's 2012 regulations, EPA has set public notice and contested case hearing requirements that only apply to NPDES permits for concentrated animal feeding operations. The process DENR is proposing meets EPA's requirements. It requires a public notice for the department's recommendation to approve or deny a permit for each NPDES permit application. There is a 30 day public notice period for all NPDES permit applications received. DENR will respond to each comment received. In addition, there is an opportunity for a contested case hearing before the Secretary. The Secretary's final decision may be appealed to circuit court.

Comment 58: Out-of-state permits do not include public notice to the citizens of South Dakota, even when the manure will be land applied in South Dakota. The only way citizens in South Dakota could know of the future land application of manure would be when a permit is proposed in South Dakota and public notice is provided locally.

- How can South Dakota enforce state water quality standards when out-of-state manure is land applied in South Dakota without a state permit?
- How can citizens protect their private property interests without public notice and opportunity for public hearing and an adjudicatory process?
- What statutory authority allows the DENR to deny private property rights to landowners that could be adversely impacted by the proposed CAFO?

Response:

- This section of the permit has been modified to make it clear that the permit for this type of operation is a state permit not a NPDES permit. The U.S. EPA does not require NPDES permits for this type of activity. The general permit included this requirement so out of state producers are treated the same as in state producers. Some counties have additional zoning requirements that also apply to out of state manure. Whether or not an operation has a state permit has no impact on the department's ability to enforce its water quality standards.
- See the response to question 57.
- See the response to question 57.

Comment 59: What is the legal pathway that adjacent landowners and other interested parties can challenge the agency approval to operate under the CAFO General Permit when the local groundwater may be in jeopardy?

Response: As part of its ground water protection requirements, the general permit requires that operations located over a shallow aquifer obtain either a ground water discharge permit and/or conduct ground water monitoring. The definition of shallow aquifer is in South Dakota Codified Law 34A-3A-24. Applications for new operations or those increasing their animal numbers applying for a state permit are public noticed. During the public notice period, citizens can submit comments including information indicating why they

believe an operation is located over a shallow aquifer to the department. The recommendations on whether to issue or deny NPDES permit to those operations applying for a NPDES permit will be public noticed. The public can submit comments including information indicating why they believe an operation is located over a shallow aquifer to the department and request a contested case hearing. In the past when the Feedlot Permit Program have received public concerns that an operation is located over a shallow aquifer and our staff determination is that an operation is not located over a shallow aquifer, the department has asked the State Geologist to independently determine whether an operation is located over a shallow aquifer.

DENR's criteria to determine whether a ground water discharge permit or ground water monitoring are required are in SDCL 34A-3A-24, Section 1.4.3.6. of the proposed general permit, and Appendix G of the proposed general permit. If a ground water discharge permit is required, it goes through a separate issuance process that includes submittal of an application for department review and recommendations, a public notice, and opportunity for a contested case hearing before the Water Management Board.

Comment 60: The construction administration report seems to represent the progress of the construction of the CAFO and could not be submitted before construction.

- Is the purpose to require “as-built” drawings that explain any deviation from the original and approved plans and specifications?
- Shouldn't there be a requirement that any variation from the approved plans and specifications should be submitted to the DENR for review and approval or denial?

Response: The purpose of the construction administration plan is to have the engineer put in writing what they will be doing for construction administration, during what critical phases of construction the engineer or an onsite representative will be present to ensure the operation is constructed as designed.

As-built drawings are required to show any deviations from the approved plans so the Secretary can verify the operation still meets the requirements of the general permit. Any revised plans or as-built plans are required to be submitted to the Secretary for approval. As described during DENR's webinar, Section 1.4.3. of the permit has been revised to indicate what changes to a permit application would require an operation to begin the permitting process again.

Comment 61: AFOs or CAFOs with a manure management system built prior to August 14, 1996 without prior DENR approval. The four criteria (i through iv) are the triggers to “provide documentation” that is defined in Section 1.2.2.4 (a)(1)(c)(vi).

- How many AFOs and CAFOs in South Dakota exist today that were built before August 14, 1996?
- How many AFOs and CAFOs that qualify for this part of the rule have been inspected by DENR with respect to potential for leakage from the 20+ year old liner systems?
- With respect to the wording of subparagraph (vi), why would 20 year old concrete-lined or synthetically-lined manure containment structure get a “pass” on criteria (i) through (iv)? Is this just poorly written or does DENR intend to not impose criteria (i) through (iv) on concrete and synthetically lined structures?
- Does DENR have a procedure to notify adjacent landowners that this “seepage” documentation is available for review and comment?

Response:

- The general permits issued prior to the 2003 general permit were only required for new or expanding operations. The 2003 general permit included this language as all CAFOs were

required to get permitted. The department does not track when manure management systems at existing CAFOs were constructed. The department does not track when manure management systems at AFOs were constructed as AFOs are not regulated.

- An existing operation seeking general permit coverage is inspected at least once by DENR prior to receiving permit coverage. This inspection would include looking for evidence of seepage. Once permitted, an operation is inspected annually or once every three years depending upon the maximum number of animals confined. These inspections include an inspection of the manure management system to ensure the system is being properly operated and maintained.
- The department does not anticipate receiving permit applications for concrete or synthetically lined manure containment systems constructed prior to August 14, 1996. If one was submitted to the department for permit coverage, Section 1.2.2.4.a.1) would apply.
- See the response to comment 57.

Comment 62: Section 1.2.3 Permit Processing.

In Section 1.2.3 Permit Processing, there is no provision to make individual notice to adjacent landowners that the DENR has received a permit application or NOI to operate under the CAFO General Permit.

The notice contents in Subsection 1.2.3.1 do not include whether or not there is the opportunity for contested case and whether the facility chooses to operate under the “state permit” or the “NPDES permit” option of this CAFO General Permit.

The public is denied due process if the facility chooses to operate under a no-discharge state permit.

- Will the DENR hold public meetings or other informational meetings to explain the adequacy of the permit application to interested parties?
- In the initial review of the permit application, how will the DENR determine whether sufficient Best Management Practices (BMPs) will be utilized by the applicant to insure minimization of nuisance and protection of ground and surface waters?
- Will the DENR post responses to written comments on the agency website?

This subsection of the regulations does not indicate whether or not the applicant will need to submit the permit application in Adobe pdf format so that access to the permit application by the general public will be simplified.

Will the DENR provide the public access to the permit application and supporting documentation online via the agency website?

Response:

Federal NPDES regulations, state statutes, and state administrative rules do not require an individual notice be provided to adjacent landowner. The intention behind the public notice, however, is to notify all interested parties. Further those landowners can participate in the general permit reissuance process, submit comments in response to any DENR public notice, and request a contested case hearing in response to any public noticed NPDES permits. State permit applications for new operations and those increasing their animal numbers will be public noticed once in a local paper and on DENR’s one stop public notice website. All NPDES permit applications will be public noticed in a local paper and on DENR’s one stop public notice website. For more information see the response to comment 57.

- DENR does not normally hold public meetings on permit applications. If a contested case hearing is held on a NPDES permit application, DENR staff will testify during the hearing.

- DENR will review the application to ensure all required best management practices (those using the word shall) are included in the permit application.
- DENR provides a copy of all written comments to those who submit comments and does not post it on our website. Generally all comments are combined into one document and that document is provided to all commenters.

DENR does not require applications to be submitted in an electronic format. Applications submitted in a hard copy format make DENR's review easier and are required in order to approve engineering plans and specifications. The U.S. EPA recently signed regulations that may require applications be submitted electronically in 5 years. DENR anticipate litigation on these regulations and does not plan on adopting these requirements until the litigation is complete, and DENR's databases are updated to handle the required information.

DENR's programs are in the process of converting hard copy files to electronic files. When they are converted, certain files will be available upon request at no cost.

Comment 63: Major modification of existing permitted facilities.

Subsection 1.2.3.7 states: "Existing permitted operations making major modifications to their manure management system or nutrient management plan will only be public noticed on DENR's one stop public notice website."

Definition of major modification in Subsection 1.1.12: "Major modification means an expansion or increase to the lot area or feeding area; change in the location of the animal feeding operation; increase in the permitted animal numbers; change in the methods of waste treatment, waste storage, or land application of waste; increase in the number of animals; change in animal species; change in the size or location of the livestock waste control facility; increase in the amount of nutrients from the manure management system land applied, change in crop rotation, or the addition of land application fields."

A change in the manure management system could include more lagoons, change in setback distances enforced by local governments, and other issues that should be noticed to the local government, adjacent landowners to the existing facility, and new parties that could be adversely impacted by change in land parcels used for disposal of manure wastewater by land application.

- What statutory authority allows the DENR to deny private property rights to adjacent landowners that could be adversely impacted by the proposed major modifications?
- Is this subparagraph limiting the definition of major modification?
- Why wouldn't the major modification warrant a notice in the newspaper of general circulation and individually to adjacent landowners?

Response:

- Federal NPDES regulations, state statutes, and state administrative rules do not require an individual notice be provided to adjacent landowners, but those landowners can participate in the general permit reissuance process, submit comments in response to any DENR public notice, and request a contested case hearing in response to any public noticed NPDES permits.
- Yes. This section is specifically for public notices that make major modifications excluding those that are expanding their animal numbers. Those expanding their animal numbers will go through the normal 30 day public notice period. This permit processing section has been revised.
- EPA's 2012 regulations do not require newspaper notifications for these types of changes. To reduce the burden of public notice requirements, EPA allowed states to set the type and length of notice. The use of web based public notices was encouraged.

Comment 64: Subsection 1.2.3.14 – Discharges at facilities that claimed no discharge and thus escaped contested case provisions otherwise afforded to the public.

The denial of due process in the permit process of a “state permit” is not substantiated by state law and in this particular subsection is further stretched to allow discharge as long as it is “fixed.”

- Why isn’t there a provision for determining the severity of the discharge before the Secretary deems “appropriately corrected”, such as contamination of ground and/or surface water, volume of the discharge, resulting fish kill or other adverse environmental impact, and other quantifying and qualifying criteria?

Response: Federal NPDES regulations, state statutes, and state administrative rules do not require an individual notice be provided to adjacent landowners, but those landowners can participate in the general permit reissuance process, submit comments in response to any DENR public notice, and request a contested case hearing in response to any public noticed NPDES permits. This section of the permit applies to anyone with a state permit that has **any discharge to waters of the state** which will be a violation of the state permit. DENR’s enforcement action for the discharge would require the operation to submit documentation that the cause of the discharge has been appropriately corrected so the CAFO does not discharge and would address any environmental damage.

Comment 65: Section 1.3 Closure Requirements.

The adjacent landowners and other interested parties should be given notice that a particular facility will be shut down so that public concerns regarding potential groundwater pollution and other environmental issues are adequately addressed before the Secretary determines the closure is complete.

- How often has the DENR closed a CAFO under this Section and did any of the facilities have to install groundwater monitoring wells to determine if pollution had occurred?
- Why isn’t there a specific provision for the inspection and determination of the adequacy of the liner of all waste storage structures prior to final closure activities? How else would the DENR know if the liner(s) actually protected local groundwater and surface water?

The section does not include a provision for long-term groundwater monitoring or site abatement if pollution has been determined.

Response: The Secretary conducts a closure inspection as required by the Administrative Rules of South Dakota, Section 74:57:01:06, prior to terminating permit coverage. Prior to the inspection, all manure and process wastewater at the operation are required to be properly land applied. After the closure inspection many operations have changed lot areas to pasture or crop land and may fill in any holding ponds. There are no U.S. EPA or state requirements for public noticing the termination of permit coverage under a general permit or of an individual permit.

The general permit’s ground water monitoring requirements for CAFOs over a shallow aquifer are those in Section 1.4.3.4. and Appendix G of the general permit. Since 1997, only four operations that had general permits that included ground water monitoring requirements have requested to terminate permit coverage and completed that process. We recommended those operations keep their monitoring wells in place, but without permit coverage, DENR cannot require the operation to continue monitoring those wells. If monitoring wells are kept in place and the department receives a ground water complaint, we might be able to access those monitoring wells to collect water quality samples.

Comment 66: Section 1.4.3 Design, Construction, Operation, and Maintenance Requirements.

Subsection 1.4.3.1 states: “Producers shall construct, operate, and maintain the CAFO in compliance with the conditions of this permit; the approved plans and specifications; the BMPs required by this permit; and the BMPs incorporated by the producer into the permit application. The producer shall include the BMPs that will be implemented at the animal feeding operation in the O&M Guideline and the Nutrient Management Plan. The producer is responsible for implementing the BMPs to ensure compliance with the terms and conditions of this permit.”

There may be other BMPs that the public would want to be used by the facility but there is no clear legal pathway to insure the public’s interests are known to DENR, especially for no-discharge state permit approvals.

- How will DENR track the success of both required and voluntary BMPs?
- If the BMPs are not successful in achieving a particular goal, such as reducing odors and flies, how will the DENR resolve the problem?

Response: DENR staff will observe whether best management practices are being implemented during inspections. Failure to implement best management practices required by the permit or those the producer indicates will be implemented in their permit application is a permit violation.

DENR is not studying best management practices to determine their effectiveness. Several national initiatives are studying the effectiveness of best management practices. Several operations in the Skunk Creek Watershed in South Dakota are part of one of these studies.

DENR does not regulate odor or flies. Generally those issues are addressed through county zoning. It is up to each county to enforce their zoning requirements unless those requirements are also incorporated into DENR’s permit application.

Comment 67: Subsection 1.4.3.3 (a) states: “Ditches, dikes, berms, terraces, or other structures shall be used to divert peak clean water flows away from a manure containment structure. These structures shall be designed with stable side slopes to carry the peak flow expected during the 25-year, 24-hour precipitation event without overtopping. Where peak flows are used to design ditches, dikes, berms, sediment basins, or other similar structures, appropriate rainfall distributions (MSE1, MSE2, and MSE3) shall be utilized (see the NRCS supplement to the National Engineering Handbook Part 650).”

The second sentence is ambiguous on which “structures” must be designed to carry the peak flow – the ditches or the manure containment structure or both.

The subsection does not identify a reliable method of proving the ability of the clean water diversion system to work for a particular site, such as HydroCad, that would take into consideration the contributing watershed(s), the available culverts used to transmit the redirected stormwater flows, any impacts on local surface water due to change in watershed, and impacts on county drainage systems.

This subsection does not address transport of sediment.

This subsection is focused on manure containment structures and does not address fresh water diversion around feed storage areas that could produce contaminated stormwater runoff if not properly protected from stormwater run-on.

Response: Section 1.4.3.3.a. of the permit addresses the diversion of clean water away from the manure management system. Section 1.4.3.3.c. of the permit addresses the diversion of process wastewater to the manure containment system.

The structures listed in the second sentence of Section 1.4.3.3.a. are those specific structures listed in the first sentence. There are several models available for flood routing. DENR is not specifying a specific model to be used.

Any change in drainage is not regulated by DENR. The legislature has given the authority to regulate drainage to county and local governments. Sediment is transported by flowing water. If a producer sees a buildup of sediment in diversion channels, etc. during required manure management system inspections, they are required to remove it.

Comment 68: Subsection 1.4.3.3(b) requires the installation of a permanent marker that shows the Maximum Operating Level in the containment structure.

The subsection does not provision to protect the liner from the installation of the permanent marker. The subsection does not specify the distance that would equate to the volume of the 25-year, 24-hour storm event and thus the level to which the liquid would be pumped down to that would satisfy the requirement for adequate freeboard and storm event storage.

Response: Depending on the manure containment system used, maximum operating level markers can be installed in a variety of ways. If a marker penetrates a liner the liner must be maintained below the marker. In response to this comment DENR has modified the language in this section to make it clear the liquid has to be pumped down below the maximum operating level to restore the 25-year, 24-hour storm event plus freeboard.

Comment 69: Subsection 1.4.3.3.d requires sediment basins to be drained to manure containment structures with 72 hours or the basin should have a liner.

What volume of stormwater would be added to the manure containment structure within 72 hours and how would that impact the storage capacity of the manure containment structure?

- How does this provision work on a swine facility with deep pit manure storage?
- How does this provision work on a dairy facility with uncovered manure containment structures?
- Is 72 hours sufficient to allow sediment to “settle” and if not, won’t the transfer of the water to a manure containment structure also include unsettled solids that would impact storage capacity?
- What is the purpose of 72 hours versus having a liner – is 72 hours a time frame related to allowable seepage?

Response: The process wastewater runoff volume contained in the sediment basin is included in the manure containment system design volume and designed to be transferred into the manure containment system (see footnote 2 for the earthen manure containment system in appendix H of the permit).

- Deep pit manure storage systems do not have sediment basins.
- Dairies may use sediment basins or other methods for solid separation.
- The permit’s sediment basin design standards are adequate to keep the majority of solids in the sediment basin where they can be removed and land applied when the sediment basin is dry.
- This number comes from an historic NRCS sediment basin design standard and has been used by DENR since that time. Sediment basins are designed to be periodically cleaned of solids. It is easier to do this if the basin does not have a liner that can be damaged. The 72 hours allows time for the solids to settle out in the sediment basin and for flow to continue on to the manure containment system which has a liner. Any basin that is designed to hold water for more than 72 hours is required to have a liner and is a sediment pond.

Comment 70: We request a Public Hearing on the proposed CAFO General Permit to express these and other concerns to SD-DENR and to learn how the proposed CAFO General Permit will protect human health and the environment.

Response: We are in the general permit's informal review process. A contested case hearing is not available at this time. When the general permit's formal process begins, the public notice for the permit will contain information on how to request a contested case hearing.